Supreme Court, U.S.
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NO. ____

In The

SUPREME COURT OF THE UNITED STATES

LEONARD BIERI III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals correctly denied appealability certification from petitioner's motion filed under Federal Rule Civil Procedure 60(b) which had been construed and denied by the district court as a second 28 U.S.C. Sec. 2255 filing, thus requiring authorization.

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PARTIES

All parties in this case are identified on the cover page.

OPINION BELOW

Petitioner seeks this Court's review of the Eighth Circuit Court's judgment of April 1, 1999, ratifying the district court's decision to deny a motion pursuant to Federal Rule Civil Procedure 60(b); as a second 28 U.S.C. 2255 proceeding, needing authorization, by subsequently denying appealability certification. The judgment(s) of the Court of Appeals is included in the Appendix at i, vii. The district court's order(s) which were notice for appeal are at Appendix iii, v.

JURISDICTION

Jurisdiction of the district court was invoke pursuant to 28 U.S.C. 2255; and the jurisdiction of the Eighth Circuit was invoked pursuant to Title 18 U.S.C. 3742 and Title 18 U.S.C. 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 and Hohn v. United States, __U.S.__, 118 S. Ct. 1969, L.Ed.2d (1998).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or navel forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VIII states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

I. BACKGROUND

On February 14, 1992, the government by superseding indictment, Count Four, sought criminal forfeiture of petitioner's dairy farm.

The Federal Rule(s) of Criminal Procedure provide for a five step implementation sequence beginning after a court decides to impose an additional forfeiture sentence pursuant to Title 18 Sec. 3553 (a)(2)(A-D). The court then declares by special verdict the extent of property forfeited (Rule 31(e)), and if any, imposes a separate sentence upon

defendant (pursuant to 18 Sec. U.S.C. 3551 (a)(b)). The court then enters both verdict and sentence (Rule 32 b (1)(2) or as amended 1996), including the order of forfeiture (18. U.S.C. Sec. 3554 recodified as 21 U.S.C. Sec. 853) at sentencing in a defendant's judgment of conviction.

Petitioner's Criminal Docket No. 92-03044-CR-S-RGC shows that the Four orders of forfeiture as entered and the three appeals express no prospective application in this case, the above provisional requirements of an imposed sentence as the Count Four, never having been met. Where as here the provisional requirements that must be met for a judgment of conviction and forfeiture to exist as complete are not met, then it and everything that follows from it is void. (See Doc. entries, 94, 99, 104, 106, 107, 108, 109, 110, 112, 123, 124, 126, 137, 143, 1/30/95--, 147, 152, 156, 165, 173, 174, 198, 199, all docket entries referenced are included in the appendix xv) (See also, United States v. Bieri, 21 F.3d 811, (8th Cir.), cert. denied, 513 U.S. 878 (1994); United v. States v. Bieri, 21 F.3d 819 (8th Cir.), cert. denied, 513 U.S. 878 (1994); United States v. Bieri, 68 F.3d 232 (8th Cir. 1995), cert. denied, 517 U.S. 1233 (1996).

An order purportedly entered as a final order of forfeiture, forfeiting Petitioner's entire farm, was entered as Doc. # 199 on 11/7/97 by the district court as directed by the Eighth Circuit (See United States v. Bieri, 68 F.3d 232 (8th Cir. 1995). However, the district court did not follow the aforementioned implementation provisions, thereby violating Petitioner's Constitutional right(s) (1) to be brought before the court and given opportunity to address the court, (2) be properly sentenced to Count Four, (3) to be advised of the right to appeal his "original sentence" or at least "sentence made anew" Rule 32(c)(5), and (4) the right to appeal itself,

(since an appeal of a sentence / order of forfeiture can not be advanced pursuant to Fed. R. Appellate Proc. 4 (b) until it is entered in Petitioner's Judgment).

After Petitioner learned of the "final" order 11/7/97 while incarcerated 11/19/97, he moved to extend the time to notice his appeal (Doc. #200 at Appex. xviii).

The district court denied the motion for extension, on 12/4/97, but ordered the notice of appeal filed on that date (at Appex. x) In that the Final Order of Forfeiture had not been entered in Petitioner's judgment of conviction, the Eighth Circuit exercised jurisdiction contrary to Fed. R. Appellate P. (4)(b) upon the government arguing that Petitioner, having failed to notice an appeal following the preliminary order entered 7/24/96, he was precluded from appealing the final order. The Eighth Circuit granted the government's motion to dismiss which stultified Appeal 97-4207WMS. Petitioner sought review via writ of certiorari, showing the Eighth Circuit's reliance on the government's motion to dismiss was clearly erroneous. See Writ of Cert. 97-9182 denied 6/26/98.

Petitioner petitioned for Rehearing under the restricted grounds specified in paragraph 2 of Supreme Court Rule 44 in light of this Court's then recent decision of U.S. v. Bajakajian, No. 96-1487 (6/22/98), challenging the Eighth Circuit's declaration in U.S. v. Bieri, 68 F.3d 232 (8th Cir. 1995), "To determine whether property is forfeitable under 21 U.S.C. Sec. 853 (a)(2), the district court's only inquiry is whether the defendant used the property" in any manner or part "to commit or to facilitate a drug trafficking offense. If so, criminal forfeiture under this statute is mandatory, not discretionary." That declaration complimented the Eighth Circuit's declaration in U.S. v. Bieri, 21 F.3d 819 (8th Cir.

1994) "The district court at sentencing clearly found that the Bieri's used part of the dairy to facilitate their drug trafficking offenses. Thus, the entire farm was forfeitable under section 853 (a), and the mandatory language of the statute does not leave forfeiture to trial court discretion."

Those declarations are obtusely uncritical of 18 U.S.C. Sec. 3553 (a)(2)(A-D), because this Court had enunciated in Bajakajian "It is therefore irrelevant whether respondent's currency is a instrumentality; the forfeiture is punitive, and the test for excessiveness of a punitive forfeiture involves solely a proportionality determination." Therein this Court expressed the essence of 18 U.S.C. Sec. 3553 (a)(2)(A-D) considerations which are provided for the district court to determine the need for any sentence to be imposed from which the proportionality determination originates.

"If criminal forfeiture under this statute is mandatory, not discretionary," as the Eighth Circuit declared, then 21 U.S.C. Sec. 853 (a)(1-3) is in direct conflict with 18 U.S.C. Sec. 3553 (a)(2)(A-D).

Title 21 U.S.C. Sec. 853 (a)(1)(2)(3) are precedented civil in rem consideration (See U.S.C. Sec. 881), that are irrelevant to 853's purpose of implementation provisions for criminal forfeiture orders. Additionally, the mandatory language that the person "shall forfeit" and the court "shall order...that the person forfeit to the United States all property described in this subsection," is language in opposite not only to 853's purpose, but to any proportionality determination imposed from the preceding provisional requirements of 3553 (a)(2)(A-D), Rule 31(e), 3551 (a)(b), Rule 32 (b)(1)(2) as amended 32d (1)(2). These are the sentences and provisions, 853's provisions are to serve as

shown when Section 853 roots are traced back to its grandfather 18 U.S.C. Sec. 3554:

18 U.S.C. Sec. 3554 summarily states:

"The court, in imposing sentence on a defendant, shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property in accordance with the provisions of 413".

Section 413 was recodified in 1984 as 21 U.S.C. Sec. 853. 21 U.S.C. Sec. 853's provisions for implementation of criminal forfeiture orders serve the sentence that is imposed pursuant to the provision of 18 U.S.C. Sec. 3551(a)(b).

18 U.S.C. Sec. 3551(a) summarily states,

"A defendant who has been found guilty of an offense described in any federal statue, including sections 13, shall be sentenced in accordance with the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all circumstances of the case".

Section 853's provisions follow the sentence of criminal forfeiture which may be imposed pursuant to Sec. 3551 (b), after the court finds under all the circumstances of (A-D) of Sec. 3553(a)(2) the need to forfeit property as an additional punishment, or in essence upon the court's discretion after having made it's proportionality determination.

This direct conflict between Section 853 and the preceding provisions specifically Sec. 3553(a)(2)(A-D) effects Due Process. The fact that the court needs to impose a

punishment consistent with the Eighth Amendment, but must forfeit all property illustrates 21 U.S.C. 853 violates both the Fifth and Eighth Amendments.

This is exactly what happened in Petitioner's case when the Eighth Circuit rejected the remand hearing findings and discretionary proportionality declaration of no forfeiture made by the district court, and ruled that criminal forfeiture under Sec. 853 is mandatory, not discretionary, and ordered the district court to forfeit Petitioner's entire farm.

The Eighth Circuit's declaration shows 21 U.S.C. Sec. 853 is unconstitutional, therefore that court's order of forfeiture is unequitable, expresses no prospective application, and thus is void. In any event, this Court denied the Petition for Rehearing on August 12, 1998.

II THE PRESENT PETITION

On October 21, 1998, Petitioner timely moved for Relief, from a judgment or order pursuant to Federal Rule of Civil Procedure, Rule 60(b), asking the district court to appropriately enter the 11/7/97 final order of forfeiture as part of Petitioner's sentence and judgment of conviction upon the validation of Due Process entitlements of enjoined sentencing, appeal, and property rights claimed within. Petitioner asserted that the final order of forfeiture was unequitable, had no prospective application, and was thus void, until the order became part of his sentence imposed, entered as such at a sentencing hearing included in his judgment. Petitioner further asserted the conditions for government intervention could not commence as forfeiture may not take place until sentence is imposed. United States v. Alexander, 722 F. Supp. 440 (D. Minn. 1990) (Doc. 230 at Appex. xviii)

The government had already seized the property, and shortly thereafter on December 15, 1998, Petitioner's farm was sold, without the government having clear title.

On January 25, 1999, Petitioner moved for Ruling and provided evidence his farm had been sold and a copy of the Suggestions Concerning Forfeiture Procedures the government had provided the court on April 2, 1992, which showed the government knew through all of Petitioner's long procedural history what should have been done but was not done, and that the government had willfully defied the laws encompassing criminal forfeiture implementation procedures in perpetrating the seizure and selling of Petitioner's farm. (See Doc. 235 at Appex. xix)

On January 27, 1999, the district court ruled that Petitioner's 60(b) motion was a second 28 U.S.C. Sec. 2255 motion thus needing certification by the Court of Appeals, and denied the motion for relief as such. (See Appex. iii, also Doc. 235 at Appex. xix)

On February 1, 1999 Petitioner noticed an appeal and also filed an Application for Certification of Appealability, alternately, Motion to Alter or Amend pursuant to Federal Rule Civil Proc. 59(e), (See Doc. 237, 238 at Appex. xix, also xi)

Appealability Certification issues pursuant to Title 28 U.S.C. Sec. 2253(c)(2) paragraph (1) were;

1. Violations of Constitutional Fifth Amendment sentencing right(s) that insure procedural implementation of criminal forfeiture provisions.

2. Governmental seizing and selling, thus depriving Petitioner of his property, violating Due Process.

Even if the Rule 60(b) motion for relief can be properly considered as a 28 U.S.C. Sec. 2255 motion, it should not have be denied as a second motion, (See Antiterrorism Effective Death Penalty Act, hereafter AEDPA, Sec. 106), because AEDPA Sec. 105 (2)(1) establishes that Petitioner's may file a 28 U.S.C. Sec. 2255 motion as a first motion within a year from the date his judgment of conviction becomes final. And here no such dates exist to this present day since there has never been a proper final judgment entered. (See Doc. 94, 238, at Appex. xv, xix)

On February 3, 1999, the district court denied both the Applications for Certification and Motion to Alter or Amend (59(e)). (At Appex. iii, v). See both Jan. 27, 1999 and Feb. 3, 1999, orders, "The district court was told by the Eighth Circuit Court of Appeals to forfeit the entire farm, United States v. Bieri, 68 F.3d 232 (8th Cir. 1995)."

On February 8, 1999, Petitioner Noticed an appeal to both orders, (See Doc. 239, 240, Docketed by the Eighth Circuit as 99-1300WMS at Appex. v, xix).

On February 10, 1999, Petitioner filed an Application for Appointment of Counsel which included a Request for Leave to Proceed on Appeal in forma pauperis. This Application included legal and factual reasons why counsel should be appointed pursuant to the Criminal Justice Act 18 U.S.C. 3006A, specifically (2)(b) alternately, if required Habeas Rule 8(c); also the Sixth Amendment.

Additionally, it provided the various requirements of Federal Civil Appellate Procedural Rule 24(a) necessary to secure Leave to Proceed on Appeal in forma pauperis.

On February 23, 1999, once again the district court declared, "The district court was told by the Eighth Circuit Court of Appeals to forfeit the entire farm United States v. Bieri, 68 F.3d 232 (8th Cir. 1995)." Both Application and Request for IFP were denied. (See Doc. 241, 242, at Appex. xix, also vii)

On April 1, 1999, the Eighth Circuit dismissed both Petitioner's appeals simultaneously, declaring the application for certificate of appealability is denied. (At Appex. ii)

Petitioner produced and timely filed on April 13, 1999, a Petition for Rehearing and/or Rehearing en banc. Petitioner suggested that his Petition should be granted because consideration of the full court was necessary in that the judgment issued April 1, 1999, by the court, was contrary to Federal Rule of Civil Procedure 60(b), the original file of the district court, Federal Rule(s) of Criminal Procedure Sec. 3551(a)(b), 3553(a)(2)(A-D); Rule 32(b)(1)(2), Supreme court precedence, it's own opinion file October 13, 1995, (No, 1234 as United States v. Bieri 68 F.3d 232 (8th Cir. 1995), and Habeas Corpus provisions outlined with AEDPA. (See Petition/and Addendum)

The Petition for Rehearing and Rehearing en banc was denied April 30, 1999. At Appex. vii. This petition for certiorari follows.

REASON FOR GRANTING THE WRIT

The Eighth Circuit Court Of Appeals ratified the district court's order construing a motion pursuant to Federal Rules of Civil Procedures 60(b) as a second filing pursuant to 28 U.S.C. Sec. 2255 by subsequently denying appealability certification, contrary to Congress's intent

and provisional requirements of both relief remedies, thereby necessitating an exercise of this Court's supervisory power.

Background

The original order of forfeiture in United States v. Bieri, 92-03044-01/02-CR-S-RGC, Doc 106, entered 4/22/92, ordered Tract 4 forfeited, as to defendant(s) but set certain stipulations including "upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture pursuant to 21 U.S.C. Sec. 853(n)..." Although no final order was entered the matter was successfully appealed by the government to the United States Court of Appeals twice. Thereafter this district court entered what are purported to be subsequent preliminary and final Orders of Forfeiture on 7/24/96 and 11/7/97.

Petitioner was never properly sentenced as to his conviction of 7/8/92, with entry of a formal sentence as to the forfeiture April 2, 1993, as required by Fed. R. Crim. P. 32 b (1)(2), United States v. Seifuddin, 820 F.2d 1074 (9th Cir. 1987) (District Court erred in allowing forfeiture where there was failure to comply with Rule 32(b)(2)). Neither the preliminary Order of 7/24/96 nor "final" Order of 11/7/97 were entered as part of Petitioner's sentence of conviction as required by Rule 32(b) or as amended 32(d).

Petitioner was incarcerated and not brought before the court or allowed to address the court at the time the preliminary and final orders of forfeiture were entered. Failure to address Defendant personally or to give Defendant the opportunity to make a statement requires resentencing. United States v. Medina, 90 F.3d 459 (11th Cir. 1996). See also, United States v. Meyers, 150 F.3d 459 (5th Cir. 1998).

Because the final Order of Forfeiture was not entered as part of his sentence as required by Rule 32(b) or 32(d)(2), he was also not appraised of his right to appeal that part of his sentence as mandated by Fed. R. Crim. P. 32(c)(5). See Thompson v. United States, 111 F.3d 109 (11th Cir. 1997) (failure to advise Defendant of right to appeal may require vacation of sentence and concomitant remand for resentencing). This is particularly prejudicial here because after the 11/7/97 Final Order of Forfeiture, when Petitioner did learn of it and sought review in the United States Court of Appeals for the Eighth Circuit (hereafter Eighth Circuit), that Court ruled the right to appeal was from the preliminary order, contrary to 32(d)(2) as amended in 1996 "The Court may enter a preliminary order forfeiture after providing notice to the Defendant and a reasonable opportunity to be heard on the timing and form of the order... **At sentencing a Final Order of Forfeiture shall be made part of the sentence and included in the judgment. The Court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal."**

In addition, if the 1996 amendments did not apply then there was no basis from a preliminary order for forfeiture and it and everything that followed from it is void. Even if the Court were to conclude the 1996 amendments did not apply [See, United States v. Christunas, 126 F.3d 765, (6th Cir. 1997), FN1, (32(d)(2) only applies where Defendant was convicted after 4/24/96)] because the original conviction was in 1992, United States v. Alexander, 722 F. Supp. 440 (D. Minn. 1990) and 21 U.S.C. 853 made it clear an Order of Criminal Forfeiture is part of the conviction judgment as part of the sentence and cannot be entered before the final sentencing. Without this final sentence imposed, and the order stipulating the conditions for

government intervention, the government should not have been allowed to proceed to seize and depose of the property. See, United States v. Ripinsky, 20 F.3d (9th Cir. 1994).

Petitioner was thereby deprived of his right to a timely appeal to attack, inter alia the underlying warrant. The property has in effect been seized without due process in violation of the Fifth Amendment, and the title obtained by the government and thereafter passed to the purchaser is tainted.

The only Eighth Amendment hearing and analysis which by implication included the gross disportionality of the forfeiture to the crime here would violate the excessive fines/disproportionate punishment [See, e.g., United States v. Busher, 817 F.2d 1409, 1415-16 (9th Cir. 1987)] prohibition of the Eighth Amendment, was the district court's finding that the sentence of 57 months for Petitioner (and 51 months for my wife) was sufficient punishment, i.e., any additional punishment whether by fine or forfeiture was uncalled for. [The district court later did enter preliminary and final orders forfeiting all four tracts, the entire farm, not because he performed a subsequent analysis or found new facts but rather because he was ordered to do so by the Eighth Circuit]. Circuit Judge John Gibson specifically criticized the Eighth Circuit's ipse dixit conclusion that there was no gross disportionality and the failure of the panel to require an analysis and hearing by the district court, see, United States v. Bieri, 68 F.3d 232 (8th Cir. 1995). A hearing and analysis that a forfeiture will not violate the Eighth Amendment is mandatory. See United States v. Bajakajian, 141 L.Ed.2d 314 (US 1998); United States v. Littlefield, 821 F.2d 1365 (9th Cir. 1987)

The inconsistent interpretations application and integration of Fed. R. Crim. P. 31(e) and 32, Title 18 Sections 3551, 3553, and 3554 as 21 U.S.C. Sec. 853 need to be rectified, clarified, and standardized so that an Order of Forfeiture is only made after an appropriate statutory and due process hearing and analysis and defendant is given timely notice of his right to file his appeal. These were not done in this case.

There are 3 important unresolved issues in this case:

1. Whether the "statute commands full forfeiture" as the Eighth Circuit ruled, or contrastingly whether the District Court or other fact finder may order one or more tracts but less than every tract forfeited. This Supreme Court - in Bajakajian supra, at 331, FN 11, specifically recognized but declined to decide, this issue which Judge Clark raised, as to whether the entire property must be forfeited, is undecided.

2. When Rule 32(b) was changed 32(d) effective 12/1/96 - did it effect the preliminary and final orders entered 7/24/96 and 11/7/97?

3. Can the Eighth Circuit authorize the district court to enter an Order of Forfeiture without giving Petitioner that process due under the Rules and Statutes provided for implementation of forfeiture orders by Congress?

This Petition

Fifth Amendment due process protections apply to Property. The government may seek to deprive a defendant of property by criminal forfeiture which serves as a sentence

enhancement for various criminal offense(s) punishment(s). Congress has substantiated Due Process by setting requirements for criminal forfeiture found within Federal Rule(s) Criminal Procedure 7(c), 31(e), 32(b) as amended 32(d), Title 18 U.S.C. Sections 3551(a)(b), 3553(a)(2)(A-D), 3554 recodified as U.S.C. Sec. 853; and provided remedies to insure those Rules and Statutes, afford due process, specifically here Federal Rule of Civil Procedure 60(b) and Title 28 U.S.C. 2255.

Rule 60(b) is tailored to address and relieve a party from a final judgment, order or proceeding for various reasons including; mistakes, newly discovered evidence, fraud, judgments that void, judgments having no prospective application, or any other reason justifying relief from the operation of a judgment.

Since the 1946 amendment writs of coram, coram vobis, audit querela, and bills of review and bills in the nature of a bill of review have been abolished for civil action, and the procedure for obtaining any relief from a judgment is made by a 60(b) motion.

In the instant case, petitioner set forth his constitutional right(s) of entitlement, including sentencing, appeal, and property concerns, that had been violated in failure to specifically observe the formal requirements of Rule 32, (Fed. R. Crim. Proc.) Rule 60(b). (See, Jones v. United States, 538 F.2d 1346 (8th Cir. 1976), "Claim of failure to observe formal requirements of Rule 32, Federal Rules of Crim. Proc., Title 18, governing imposition of sentence is not cognizable under proceeding seeking to vacate, set aside or correct sentence." (See U.S.C.A. 28 Sec. 2255, 375, Rules violations) (See Doc. 230 at Appex. xviii) After reviewing petitioner's 60(b) motion containing

issues that the Eighth Circuit had declared were not cognizable in a U.S.C. Sec. 2255 proceeding, the district court on January 27, 1999, construed the 60(b) motion as a second U.S.C. Sec. 2255 filing thus requiring authorization by the Eighth Circuit Court of Appeals. April 1, 1999 the Eighth Circuit ratified the district court's decision that petitioner's 60(b) motion (containing issues not cognizable under Sec. 2255) was indeed a 28 U.S.C. Sec. 2255 motion by subsequently denying "certificate of appealability". (See Appex. ii, iii)

Petitioner's judgment of conviction Doc 94, Motion for Relief 60(b), Motion for Ruling, Application for Appealability/Motion to Alter or Amend, the Eighth Circuit April 1, 1999 Judgment, Petition for Rehearing/en banc, Addendum to Petition shows the Eighth Circuit's judgment of April 30, 1999 denying Petition for Rehearing/en banc is in opposite to it's own opinion of Jones v. United States, CA8 (Iowa) 1976, 538 F.2d 1346, and the Antiterrorism Effective Death Penalty Act, Habeas Corpus Reform and this Court's rulings of both Felker v. Turpin, No. 95-8836(A-890); and Arnold F. Hohn v. United States, No. 96-8986, 99 F.3d 892. (See all above documents referenced in Appex.) (See also U.S.C.A. 28 2255, 375.)

The necessary threshold of requirements to achieve an application by Rule 60(b) are not the same as those requirements under U.S.C. Sec. 2255. Therefore an application under Rule 60(b) should parallel those rules and need not achieve nor be subjected to additional provisions under U.S.C. Sec. 2255 for purposes of denial.

Seven circuits, however, have construed an application under Rule 60(b) as an application under U.S.C. Sec. 2255 for purposes of denying those applications, see

McQueen v. Scroggy, 99 F.3d 1302, 1335, (6th Cir. 1996); Hunt v. Nuth, 57 F.3d 1327, 1339 (4th Cir. 1995) cert. denied, ---U.S.---, 116 S. Ct. 724, 133 L. Ed.2d 676 (1996); Clark v. Lewis, 1 F.3d. 814, 825 (9th Cir. 1993); Williams v. Whitley, 994 F.2d 226, 230 n. 2 (5th Cir. 1993); Blair v. Armontrout, 976 F.2d 1130, 1134 (8th Cir. 1992); Hope v. United States, 43 F.3d 1140, 1144 (7th Cir. 1994); Lopez v. Douglas, 141 F. 3d 974, 975 (10th Cir. 1998).

These opinions abrogate Congress's deliberate and well founded Constitutional intent to provide relief from all aspects of any judicial proceeding to insure an outcome of reliability. There were well seasoned reasons why Congress found no purpose to include the Writ of Habeas Corpus in the enactment of these federal rules of relief, one obviously was those errors encompassed by the rules in most instances would not require bringing a defendant before the court, and two, the provisions for Writ of Habeas Corpus were well established and had no consequence to the intent Congress initiated for the enacted new federal rules. The provisions of 28 U.S.C. Sec. 2255 expressed no concern to Congress at the time it set forth the new federal relief rules in that the U.S.C. Sec. 2255 provisions were not enacted into law until 1948.

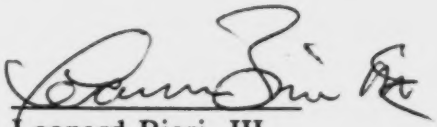
The above seven circuit's have set a coarse for applications under Rule 60(b) that is inconsistent with Congress's intent and provisional requirements of that viable and specific rule of relief. That coarse seems to include that a court may by adding an extra layer of provisional requirement(s) for U.S.C. Sec. 2255 proceedings can construe and deny an application styled under Rule 60(b) as a U.S.C. Sec. 2255 application. This designation of Federal R. Civil Proc. 60(b) and traverse of Congressional intent is in need of an exercise of this Supreme Court's supervisory

powers. Petitioner's case is appropriate to set forth the proper coarse thereby invalidating the one presently being pursued in the above mentioned circuits. This Court would as consequence be positioned to enunciate the interpretations of application and integration of Fed. R. Crim.P. 31(e) and 32, 18 U.S.C. Sections 3551, 3553(a)(2)(A-D), 3554 as 21 U.S.C. Sec. 853 that need to be rectified, clarified and standardized so that an Order of Forfeiture is only made after an appropriate statutory and due process hearing and analysis and defendant is given timely notice of appeal. Additionally, in light of the arbitrary declarations made by the Eighth Circuit in the published opinions United States v. Bieri, 21 F.3d 819 (8th Cir.), cert. denied, 513 U.S. 878 (1994); United States v. Bieri, 68 F.3d 232 (8th Cir. 1995), cert. denied, 517 U.S. 1233 (1996), this Court could thereby resolve whether, "21 U.S.C. Sec. 853 commands full forfeiture" as the Eighth Circuit ruled, or contrastingly whether the district court or other fact finder may order one or more tract(s) but less than every tract forfeited. This Court - in Bajakajian supra, at 331, FN 11, specifically recognized but declined to decide this issue, which Judge Clark raised as to whether the entire property must be forfeited.

Alternately, in recognition of preceding Background the Court should take this case to hold Petitioner is entitled to his rights under the Rules, Statutes and Constitution to a sentencing hearing during which a special verdict, sentence and an order of forfeiture as to Count Four must be entered in his judgment of conviction, and notice of his right to appeal at that time.

CONCLUSION

For all the foregoing reasons, documents, cited authorities, case, facts of laws, and authority of this Court petitioner submits that his Petition for Writ of Certiorari should be granted. Petitioner prays in the interest of justice, judicial integrity, and finality, these will be made so by this Supreme Court granting this Writ of Certiorari.



Leonard Bieri, III
Acting pro se
2022 N. Weller Ave.
Springfield, Mo. 65802

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-1300WMS

Leonard Bieri, III,	*	
	*	
Appellant,	*	
	*	Appeal from the
	*	United States District
v.	*	Court for the Western
	*	District of Missouri
	*	
United States of America,	*	
	*	
Appellee.	*	

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

April 1, 1999

Order Entered at the Direction of the Court:

(/S/ Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

LEONARD BIERI, III,	)	
	)	
Movant,	)	
	)	
vs.	)	No.
	)	92-03044-02-CR-S-RGC
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Respondent.	)	

ORDER

On October 21, 1998 Leonard Bieri, III filed a motion for relief from judgment or order. This case involved the forfeiture of the movant's farm. The Court mistakenly said this was a civil case on December 4, 1997. It is a criminal case.

On April 2, 1993 the Court sentence movant and on April 22, 1993 the Court forfeited Tract 4. The forfeiture provision was reversed by the Eighth Circuit Court of Appeals on April 13, 1994, United States v. Bieri, 21 F.3d 819 (8th Cir. 1994). On December 20, 1994 this Court found that the entirety of movant's farm shall not be forfeited. This was reversed and the district court was told to forfeit the entire farm. United States v. Bieri, 68 F.3d 232 (8th Cir. 1995). On November 7, 1997 the entire farm was forfeited.

Although couched as a Rule 60(b) motion under the Federal Rules of Civil Procedure, it is a 28 U.S.C. § 2255 motion. On June 4, 1997 movant filed a motion to vacate the sentence. The motion was denied on August 13, 1997. There was no certification by the Court of Appeals as required in 28 U.S.C. § 2255 in this motion. It is ORDERED the motion for relief from judgment or order is denied.

(/S/ Russell G. Clark)
RUSSELL G. CLARK, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Date: Jan. 27 1999

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

LEONARD BIERI, III,	)	
	)	
Movant,	)	
	)	
vs.	)	No.
	)	92-03044-02-CR-S-RGC
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Respondent.	)	

ORDER

On January 27, 1999 the Court denied movant's motion for relief from judgment or order. It was denied on the basis that there was no certification by the Eighth Court of Appeals.

On February 1, 1999 the movant filed a notice of appeal and an application for a certificate of appealability, or alternatively, a motion to alter or amend.

The district court was told to forfeit the entire farm. United States v. Bieri, 68 F.3d 232 (8th Cir. 1995). On November 7, 1997 the entire farm was forfeited.

The motion for relief from judgment or order is attacking the order entered forfeiting the entire farm. It is ORDERED the application for a certificate of appealability

is denied; and it is further ORDERED the motion to alter or amend the judgment is denied.

(/S/ Russell G. Clark)
RUSSELL G. CLARK, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Date: Feb. 3, 1999

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-1300WMS

Leonard Bieri,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
	*	Rehearing andv. for
	*	Rehearing En Banc
United States of America,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied., The petition for rehearing by the panel is also denied.

(5128-010199)

April 30, 1999

Order Entered at the Direction of the Court:

(/S/ Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

LEONARD BIERI, III, Movant,	)
vs.	) No. 92-03044-02-CR-S-RGC
UNITED STATES OF AMERICA, Respondent.	)

ORDER

On February 3, 1999 the court denied the application for a certificate of appealability and the motion to alter or amend the judgment.

On February 10, 1999 the movant filed an application for appointment of counsel and a request to proceed on appeal in forma pauperis.

The case involves the forfeiture of the farm. The district court was told by the Eighth Circuit Court of Appeals to forfeit the entire farm, United States v. Bieri, 68 F.3d 232 (8th Cir. 1995).

The issue has already been litigated. It is ORDERED the application for appointment of counsel and the request to proceed on appeal in forma pauperis are denied.

(/S/ Russell G. Clark)

RUSSELL G. CLARK, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Date: 02/23/99

IN THE UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

LEONARD BIERI, III,	)
	)
Movant,	)
	)
vs.	) No.
	) 97-3284-CV-S-RGC
	)
UNITED STATES OF	)
AMERICA,	) Criminal Case
	) No. 92-03044-02-CR-S-RGC
Respondent.	)

ORDER

On November 7, 1997 the Court entered an order of forfeiture of the entire farm of movant. See United States v. Bieri, 68 F.3d 232 (8th Cir. 1995). On November 26, 1997 Leonard Bieri, III filed a motion for an extension of time to file a notice of appeal from the order of November 7, 1997. this is a civil case, United States v. Lavin, 942 F.2d 177 (3rd Cir. 1991) and movant has until January 6, 1998 in which to file a notice of appeal. It is ORDERED the motion for an extension of time in which to file a notice of appeal is denied; and it is further ORDERED the Clerk is directed to file the notice of appeal on the date of this order.

(/S/ Russell G. Clark)
RUSSELL G. CLARK, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Date: Dec. 4, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Leonard Bieri, III	)	
Movant	)	
vs.	)	
	)	Case No. 92-030440-CR-S-RGC
United States of	)	
America,	)	
Respondent	)	

NOTICE OF APPEAL

Please take notice above Movant hereby appeals to the United States Court of Appeals for the Eighth Circuit from the issuance of an Order of the District Court denying Motion for Relief from Judgment Or Order, a 28 U.S.C. 2255 motion, entered January 27, 1999.

Respectfully submitted,

(/S/ Leonard Bieri, III)
Leonard Bieri, III
Acting pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, via United States Mail, this 1 Day of February, 1999, to:

Assistant U.S. Attorney
901 St. Louis St.
Springfield, Mo. 65806

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Leonard Bieri, III	)	
Movant	)	
vs.	)	
	)	Case No. 92-030440-CR-S-RGC
United States of	)	
America,	)	
Respondent	)	

NOTICE OF APPEAL

Please take notice above Movant hereby appeals to the United States Court of Appeals for the Eighth Circuit from the issuance of an Order of the District Court in which both, Application for Certification of Appealability; and Motion to Alter or Amend pursuant to Fed. R. Civil Proc. Rule 59(e), were denied, entry date February 3, 1999.

Respectfully submitted,

(/S/ Leonard Bieri, III)
Leonard Bieri, III
Acting pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, via United States Mail, this 8 Day of February, 1999, to:

Assistant U.S. Attorney
901 St. Louis St.
Springfield, Mo. 65806

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Leonard Bieri, III	)	
Movant	)	
vs.	)	
	)	Case No. 92-030440-CR-S-RGC
United States of	)	
America,	)	
Respondent	)	

NOTICE OF APPEAL

Please take notice that the above Movant hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Final Order of Forfeiture pursuant to 853(a) rendered against him and sentence imposed by the district court; and in accordance with the judgment and mandate of the Court of Appeals entered November 7, 1997.

Respectfully submitted,

(/S/ Leonard Bieri, III)

Leonard Bieri, III
Acting pro se
06823-045
P.O. Box 4000
Springfield, MO 65801

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been sent this 24th day of Nov., 1999, by regular U.S. Mail with sufficient postage affixed thereto, insure delivery thereof, to the Office of the U.S. Attorney, Hammons Tower, Suite 500, 901 St. Louis Street, Springfield, Missouri, 65806.

(/S/ Leonard Bieri, III)
Leonard Bieri, III
Acting Pro Se

Proceedings include all events.
TERMED
6:92cr303044-ALL USA v. Bieri, et al
CKATTY

4/2/93 94 JUDGMENT and Commitment issued to U.S. Marshal sentencing as to Leonard Bieri (2) count(s) 1s, 2s. Ct. 1S - 57 mos impr; Ct. 2S - 57 mos impr to run with sentence imposed on Ct. 1S. $100.00 mpa. After from imprisonment, dft is placed on 6 yrs supervised on Ct. 1s and 6 yrs supervised release on Ct. 2S to run concurrent with Ct. 1S. As a special condition of supervised release, the dft may be required to participate in any substance abuse counseling program, which may chemical testing, as directed by the Probation Office. Ct. 4 - Court rules forfeiture applicable only as to tract house and barn are located. No fine imposed. ESS until 5/3/93. Court grants mtn for bond pending appeal. dismissing counts Leonard Bieri (2) count(s) 1, 3s. Dismissed on government motion Judge Russell G. Clark (jk) [Entry date 04/06/93]

4/6/93 99 NOTICE OF APPEAL by defendant Leonard Bieri III from Dist. Court decision [94-1] Filed 4/2/93 Entered 4/6/93 Paid $ 105 Rct. # 41381 (cd) [Entry date 04/06/93]

4/8/93 104 Notification by Circuit Court of Appellate Docket Number, 93-1870WMS (Susan) and 93-1872WMS (Leonard) w/schedo -- Clk Rec due 4/28/93 (cd) [Entry date 04/12/93]

4/22/93 106 ORDER by Judge Russell G. Clark of forfeiture as to Susan D Bieri, Leonard Bieri III (cc: all counsel) (jk) [Entry date 04/22/93]

5/3/93 107 NOTICE OF APPEAL by defendant from Dist. Court decision [106-1] Filed 04/22/93 Entered 04/22/93 Paid $ 105.00 Rct. # 65811 (jk) [Entry date 05/05/93]

5/10/93 108 Notification by Circuit Court of Appellate Docket Number 93-2157WMS [NOTE: for purposes of oral arg consol with 93-1870 & 93-1872] No Clk Rec on this forfeiture ct appeal (cd) [Entry date 05/10/93]

5/21/93 109 NOTICE OF APPEAL by plaintiff USA from Dist. Court decision [106-1] Filed 4/22/93 Entered 4/22/93 Paid $ -0- Rct. # n/a (cd) [Entry date 05/24/93]

5/24/93 110 NOTICE OF APPEAL by plaintiff USA from Dist. Court decision [106-1] Filed 4/22/93 Entered 4/22/93 Paid $ waived (USA vs Susan Bieri) (cd) [Entry date 05/24/93]

6/1/93 112 Notification by Circuit Court of Appellate Docket Number, 93-2373 & 93-2372 WMS (cd) [Entry date 06/01/93]

10/24/94 126 CERTIFIED copy of judgment and order from USCA as to Susan D Bieri affirming in part and reversing in part the decision of the District Court [109-1]; Mandate Issued: 10/20/94 (cc: all counsel) (cd) [Entry date 10/24/94]

12/20/94 137 MINUTE ENTRY on evidentiary hrg re forfeiture as to defendant Susan D Bieri, defendant Leonard Bieri III, Judge Russell G. Clark presiding; the Court finds that the dfts farm shall not be forfeited, dfts

shall self-surrender to desgn place of confinement by 2:00 p.m. on 01/23/95, dfts continued on present bond (jm) [Entry date 2/20/94]

1/18/95 143 NOTICE OF APPEAL by plaintiff USA from Dist. Court decision, [139-1] Filed 12/20 & 21/94 Entered 12/20 & 21/94 Paid $ -0- wv Rct. # n/a (cd) [Entry date 1/18/95]

1/30/95 -- Notification by Circuit Court of Appellate Docket Number 95-1234WMS (jm) [Entry date 1/30/95]

1/30/95 147 NOTICE OF CROSS-APPEAL by defendant Susan D Bieri, defendant Leonard Bieri III from Dist. Court decision, [146-1] Filed 12/20/94, 1/18/95 Entered 12/20/94, 1/18/95 Paid $ 105 Rct. # 82665 (cd) [Entry date 02/02/95] [Edit date 02/02/95]

6/20/96 152 CERTIFIED copy of judgment and order from USCA ORDERED THAT the jgm of the USDC is reversed and cause is remanded for proceedings consistent with the opinion 1 [143-1] ; Mandate issued: 6/14/96 (cc: all counsel and USMS) (cd) [Entry date 06/20/96]

6/28/96 156 MOTION by USA for order for entry of preliminary order of forfeiture as to Susan D Bieri, Leonard Bieri III (jk) [Entry date 07/01/96]

7/24/96 165 PRELIMINARY ORDER OF FORFEITURE by Judge Russell G. Clark granting motion for order for entry of preliminary order of forfeiture [156-1] as to Susan D Bieri, Leonard Bieri III (cc: all counsel) (jk) [Entry date 07/24/96]

9/10/96 173 Return of svc by USMS of preliminary Order of Forfeiture (cd) [Entry date 09/10/96]

9/12/96 174 Proof of publication as to USA (se) [Entry date 09/12/96]

11/5/97 198 MOTION by USA for Final Order of Forfeiture as to Susan D Bieri, Leonard Bieri III (cd) [Entry date 11/05/97]

11/7/97 199 FINAL ORDER OF FORFEITURE by Judge Russell G. Clark as to Susan D Bieri, Leonard Bieri III (cc: all counsel) (jk) [Entry date 11/07/97]

11/26/97 200 MOTION by Leonard Bieri III to extend time to file notice of appeal (cd) [Entry date 11/26/97]

12/4/97 203 ORDER by Judge Russell G. Clark denying motion to extend time to file notice of appeal [200-1] as to Leonard Bieri III The clerk is directed to file the notice of appela on the date of this order. (cc: all counsel) (cr) [Entry date 12/04/97]

12/4/97 204 NOTICE OF APPEAL by defendant Leonard Bieri III from Dist. Court decision [199-1] Filed 11/7/97 Entered 11/7/97 Paid $ 0 Rct. # (cr) [Entry date 12/04/97]

10/21/98 230 MOTION by Leonard Bieri III for relief from judgment or order (1c) [Entry date 10/21/98]

1/25/99 234 MOTION by Leonard Bieri III for ruling (mr) [Entry date 01/25/99]

1/27/99 235 ORDER by Judge Russell G. Clark denying motion for relief from judgment or order [230-1] as to Leonard Bieri III (cc: all counsel) (jk) [Entry date 01/27/99]

2/1/99 237 NOTICE OF APPEAL by defendant Leonard Bieri III from Dist. Court decision [235] Filed 1/27/99 Entered 01/27/99 Paid $ 0 Rct. # (mr) [Entry date 02/01/99] [Edit date 02/03/99]

2/1/99 238 MOTION by Leonard Bieri III for certification of appealability, or to alter or amend (mr) [Entry date 02/01/99]

2/3/99 239 ORDER by Judge Russell G. Clark denying motion for certification of appealability [238-1], denying motion to alter or amend [238-2] as to Leonard Bieri III (cc: all counsel) (am2) [Entry date 02/03/99]

2/8/99 240 NOTICE OF APPEAL by defendant Leonard Bieri III from Dist. Court decision [239-1] Filed 2/3/99 Entered 2/3/99 Paid $ 0 Rct. # n/a (am2) [Entry date 02/08/99]

2/10/99 241 MOTION by Leonard Bieri III for appointment of counsel, and to appeal forma pauperis (mr) [Entry date 02/10/99]

2/23/99 242 ORDER by Judge Russell G. Clark denying motion for appointment of counsel [241-1], denying motion and to appeal forma pauperis [241-2] as to Leonard Bieri III (cc: all counsel) (2 copies & updated docket sheet to 8th Cir) (jm) [Entry date 02/23/99]

6/9/99 244 CERTIFIED copy of judgment and order from USCA as to Leonard Bieri III ORDERED THAT the application of a certificate of appealability is denied; dismissing the appeal [240-1], [237-1] ; Mandate Issued: 6/7/99 (cc: all counsel) (cd) [Entry date 06/09/99]